

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION
CORPORATION,

Adv. Pro. No. 08-01789 (BRL)

Plaintiff-Applicant,

SIPA Liquidation

v.

BERNARD L.MADOFF INVESTMENT
SECURITIES LLC,

Defendant.

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Before: Burton R. Lifland,
United States Bankruptcy Judge

**MEMORANDUM DECISION AND ORDER DENYING MOTION TO MODIFY
ORDER ESTABLISHING DEADLINES FOR THE FILING OF CUSTOMER CLAIMS**

Lucerne Foundation, Collingwood Enterprises and Douglas Rimsky (collectively, “Movants”), move for an order modifying this Court’s December 23, 2008 order (the “Claims Procedures Order”) establishing deadlines the (“Bar Dates”) for the filing of customer claims in the Bernard L. Madoff Investment Securities LLC (the “Debtor”) proceeding. Movants identify themselves as investors who have received distributions from the Debtor directly or indirectly prior to December 11, 2008. They have either been paid in full or, for strategic purposes, do not wish to file claims prior to the established Bar Dates.

While couched in terms of a request for clarification, Movants actually request that the Claims Procedures Order be modified to provide expressly that any claim arising in the future as a result of the Trustee’s successful pursuit of an avoidance action is excepted from the Bar Date and need not be filed until 30 days after the judgment giving rise to the claim becomes final. The Claims Procedures Order provides, among other things, an absolute July 2, 2009 deadline

for the filing of all claims.¹ *See* Claims Procedures Order at pp. 3, 7; 15 U.S.C. § 78fff-2(a)(3).

The Securities Investor Protection Corporation (“SIPC”), the Trustee appointed pursuant to the Securities Investor Protection Act (“SIPA”) and an Unofficial Committee of (unofficial) Claim Holders strenuously oppose the motion.

Discussion

Section 78fff-2(a)(3) of SIPA contains a six-month time limit for filing customer claims:

Time limitations-No claim of a customer or other creditor of the debtor which is received by the Trustee after the expiration of the six-month period beginning on the date of publication of notice.... shall be allowed, except that the court may, upon application within such period and for cause shown, grant a reasonable, fixed extension of time for the filing of a claim by the United States, by a State or political subdivision thereof, or by an infant or incompetent person without a guardian.

15 U.S.C. § 78fff-2(a)(3) (1981). Thus, it is clear from the face of the statute that the six-month time limit for filing is subject to extension at the discretion of the court in only three specified instances, none of which are applicable here. *See Miller v. Austin*, 72 B.R. 893, 896 (S.D.N.Y. 1987). Further emphasis is contained in the legislative history of the provision. The Section-by-Section Summary of the SIPA Amendments of 1977 states:

Claims of customers. . . must actually be received by the trustee within a six-month period from the date of publication of notice. . . . Claims filed more than six months after publication would be barred except for certain claims by a government authority, an infant or an incompetent. . . .

Id. citing Report of the Senate Committee on Banking, Housing and Urban Affairs, No. 95-763, 95th Cong., 1st Sess. at 12; 3 U.S.Code Cong. & Admin.News 764, 775 (1978). *Securities and Exch. Comm'n v. Kenneth Bove & Co.*, 353 F. Supp. 496, 497 (S.D.N.Y. 1973) (recognizing that

¹ The Claims Procedure Order also sets an initial period (not to exceed sixty days from the date of publication) for the filing of customer claims. SIPA provides for this initial period for customers who have claims for securities, to the extent possible, to have their claims satisfied in kind. Since Movants do not seek to recover securities, they face only the July 2, 2009 Bar Date.

the six-month time limit is the “absolute outer limit”). Accordingly this Court does not have the discretion to extend the statutory bar date for filing SIPA claims under these circumstances.

What the Movants actually seek is a declaration that the Claims Procedures Order will not affect the ability to file claims arising from future avoidance judgments pursuant to section 502(h), title 11, United States Code (the “Bankruptcy Code.”).² However, since no avoidance claims have been asserted, such relief would constitute an impermissible advisory opinion. A court may not exercise subject matter jurisdiction absent compliance with Article III of the Constitution which limits judicial authority to “cases” and “controversies.” U.S. Const. Art. III, § 2. “To satisfy the Article III case or controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision.” *Iron Arrow Honor Society v. Heckler*, 464 U.S. 555, 560-61 (1992). Here, the Movants fail to demonstrate that they have suffered or imminently will suffer, any real or substantial injury. Movants admit that they do not currently have claims against the Debtor. They merely allege that they are potential defendants to actions which may or may never be commenced. This Court is not deciding whether section 502(h) of the Bankruptcy Code applies unless and until that issue ripens and is brought by a party with standing to do so.

In the meantime, and if so inclined, the Movants can file protective proofs of claim. Bar dates apply to creditors who have reason to believe they have a claim, even if the claim has not yet accrued. *See In re Globe Metallurgical, Inc.* 312 B.R. 34, 42 (Bankr. S.D.N.Y. 2004) *citing First Fidelity Bank, N.A. v. Hooker Investments, Inc., L.J. (In re Hooker Investments, Inc.)*, 937 F.2d 833, 837-38 (2d Cir. 1991). And although the filing of a proof of claim would submit the

² Although section 78fff(b) of SIPA specifies that the provisions of the Bankruptcy Code shall apply in SIPA liquidation proceedings, to the extent that they are consistent with SIPA, it is unclear whether section 502(h) of the Code would apply. 15 U.S.C. § 78fff(b) (1981).

claimant to the equitable jurisdiction of this court, "observance of a bar date clearly may be required even if it alters the method of fact finding on the merits of the claim by limiting the availability of a jury trial." *See In re Hooker Invs., Inc.*, 937 F.2d at 840 ("parties to litigation are frequently required to make choices that may affect their rights.").³ The filing or non-filing of a claim is an act of volition employed by individual parties as a tactical decision. Here, the Movants have until July 2, 2009, to evaluate their individual circumstances.⁴

Conclusion

For the reasons set forth, the Motion to Modify the Order Establishing Deadlines for the Filing of Customer Claims is denied.

SUBMIT AN ORDER CONSISTENT WITH THIS DECISION.

Dated: New York, New York
February 24, 2009

/s/ Burton R. Lifland
United States Bankruptcy Judge

³ In *Hooker*, the Second Circuit found that a creditor who invokes the Bankruptcy Court's equitable jurisdiction to establish a claim against a debtor's estate is also subject to the procedures of equity in the determination of preference actions brought on behalf of the estate, and held that the plaintiff was obligated to observe the bar date set by the Bankruptcy Court regardless of the fact that it altered the method of fact finding on the merits of the claim by limiting the availability of a jury trial. *In re Hooker*, 937 F.2d at 838, 840.

⁴ For example, for many a driving factor may be the tax consequences.